81-1458

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

JOSEPH C. RUSSELLO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit (Former Fifth Circuit Case)

RAYMOND E. LaPORTE
410 Ware Boulevard
Suite 601
Tampa, Florida 33619
(813) 621-4771

Attorney for Petitioner,
JOSEPH C. RUSSELLO

JOE B. KLAY & SONS, INC. TAMPA, FLORIDA

QUESTIONS PRESENTED

1. Whether an accused charged with a violation of 18 U.S.C. §1962 (c) may properly be convicted by proof of associating with an enterprise not charged in the Indictment.

2. Whether an accused charged with a violation of 18 U.S.C. §1962 (d) may properly be convicted by proof of associating with an enterprise not charged in the Indictment.

3. Whether a mere customer of a racketeering enterprise is criminally liable under 18 U.S.C §1962.

4. Whether joint trial principles of *Kotteakos v. United States*, 328 U.S. 750 (1946) are inapplicable to RICO prosecutions.

5. Whether, with respect to the mail fraud convictions, there was a fatal variance between the charge in the Indictment and the evidence.

6. Request to adopt issues and arguments of co-petitioners.

PARTIES BELOW

United States of America

William H. Brown

Berton B. Chase – (Not interested in this Petition)

Jimmy Farina

John D. Fisher

Paul Guarino

John Alan Holt (Deceased)

Joseph D. Lazzara

John Nicholas Lostracco (Deceased)

Joseph Macaluso

Sam C. Martino

Amalia Morgado

Rosario Palermo

Rolando Gonzalez Rodriguez

Joseph C. Russello

Frank Scionti

Robert D. Young

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In the

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October Term, 1981

JOSEPH C. RUSSELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (FORMER FIFTH CIRCUIT CASE)

Joseph C. Russello Petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the former Fifth Circuit (now the Eleventh Circuit) in this case.

OPINION BELOW

The opinion of the Court of Appeals (App. 1 a et. seq.) is reported at 648 F. 2d 367 (1981).

JURISDICTION

The decision of the Court of Appeals was announced on June 19, 1981. No judgement has been entered based thereon, since the Court of Appeals has stayed its mandate pending the filing and disposition of this Petition. A Petition for Rehearing and Suggestion for Rehearing En Banc were timely filed. Said Petitions were denied on September 17, 1981.

The time for filing a Petition for a Writ of Certiorari was enlarged to December 16, 1981, for Joseph C. Russello, by Mr. Justice Powell (App. 54a).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

Constitutional Provisions, Statutes and Rules

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

Title 18 U.S.C. §1341 provides, in pertinent part:

> Whoever, having devised . . . any scheme or artifice to defraud, . . . for the purpose of executing such scheme . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service or takes or received therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§1961ff provides, in pertinent part:

1961. Definitions:

As used in this chapter —

(1) *Racketeering activity* means (A) any act or threat involving . . . arson . . . which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under . . . 18 U.S.C. . . . Section 1341 (relating to mail fraud) . . .;

(4) *Enterprise* includes any individual, partnership, corporation, association, or other legal entity, and any union or group or individuals associated in fact although not a legal entity;

(5) *Pattern of racketeering activity* requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity . . .

1962. Prohibited Activities.

(C) It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly, or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . .

(D) It shall be unlawful for any person to conspire to violate any of the provisions of subsections . . . (c) of this section.

The Federal Rules of Criminal Procedure provide, in pertinent part:

Rule 8 (b). Joinder of Defendants.

Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder.

If it appears that a defendant . . . is prejudiced by a joinder of offenses or of defendants . . . for trial together, the court may . . . grant a severance of defendants or provide whatever other relief justice requires.

Statement of the Case

Willie Noriega, an admitted arsonist, testified that in the summer of 1975 the Petitioner, Russello, asked Noriega to burn the front half of the Central Professional Building owned by Russello. Noriega agreed and set the fire on August 17, 1975. Although the fire admittedly did not accomplish what Noriega said it would, Russello paid Noriega $5,500.00. Russello testified in his defense that he did not request the building be burned and that he paid Noriega because of fear of Noriega.

Joseph Carter, an insurance adjuster, did not know that this fire was going to occur before Noriega set the fire (Vol. 57, P. 171). Carter learned of the fire after it occurred and went to the scene in a legitimate attempt to obtain the assignment from the insurance company to adjust the fire losses. Neither Carter nor Russello knew the other until they met after the fire.

Carter saw Noriega at the scene of the fire but did not speak to him at that time. Several days later Carter met Noriega and Noriega was reluctant to tell Carter anything about the fire or its origin. Carter ultimately "extracted the information" from Noriega (Vol. 58, P. 443).

A couple of days later, after receiving the adjusting assignment from the insurance company, Carter approached Russello and told him that Carter knew what had happened. Carter "tactfully" told Russello that he had to pay Carter 10% of what he collected from the insurance company for Carter's services in adjusting the fire loss for that company (Vol. 56, P. 95-97). Russello agreed and ultimately paid Carter a total of $30,000.000

Carter testified that he completed the Proof of Loss to be sent to the insurance company. After Russello signed the Proof of Loss, Carter mailed it to the insurance company. According to Carter the Proof of Loss (Gov't. Ex. 62) contained false statements in that it had an inflated value of the building and a statement that the loss did not originate by

an act, design or procurement on the part of the insured or anyone known to him (Vol. 56, P. 100).

Noriega never told Russello to pay Carter and never saw any payments made. Noriega testified that "It wasn't my business. They were handling that themselves." (Vol. 52, P. 676).

After Carter mailed the Proof of Loss to the insurance company, the company then mailed back a draft made payable to Russello.

On June 8, 1977 a 35 Count Indictment was filed charging 23 Defendants with mail fraud, a RICO conspiracy Count and a RICO substantive Count.

Three Defendants, (Noriega, Carter and Arrigo), plead guilty. Of the twenty Defendants who went to trial, sixteen were found guilty of one or more counts and four Defendants, (Rivera, Gomez, Fernandez and Stark), were acquitted of all charges.

A summarization of the facts concerning each of the Defendants can be found in the opinion of the Appellate Court and in the Defendant's respective Petitions to this Court.

Count One of the Indictment charged all twenty-three Defendants with conspiracy to conduct and to participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity (18 U.S.C § 1962 (d)).

Count Two charged only twenty-two of the Defendants (Chase was omitted) with the substantive RICO violation (under § 1962 (c)) in that they did conduct and participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity.

The enterprise in Count One was alleged to be all 23 Defendants associated together in fact for the purpose of defrauding insurance companies by arson and the use of the mail.

The enterprise in Count Two was alleged to be 22 Defendants associated together in fact for the same purpose in Count One.

Counts 3 through 35 charged various Defendants with violations of the mail fraud statute, 18 U.S.C. § 1341, and aiding and abetting.

Russello was charged in Counts One, Two, and the mail fraud Counts of Twenty-eight and Twenty-nine. He was found guilty of all four Counts and sentenced to 10 years each on Counts One and Two and 5 years each on Counts Twenty-eight and Twenty-nine. The sentences were concurrent.

The questions presented by this petition were raised in the Appellate Court. Included in the issues raised was the contention that the enterprise proven by the evidence was not the enterprise charged in the Indictment and that four Defendants had been acquitted of being members of the enterprise charged in the Indictment.

The opinion of the Appellate Court does not discuss the contention that the enterprise charged and the enterprise proven are not the same.

The convictions of Russello were affirmed.

The forfeiture conviction is not contained in this Petition as a rehearing en banc has been granted on the Court's own motion concerning the forfeiture issue only.

Argument of Reasons for Granting the Writ

Each of the questions in this Petition present important questions of federal law pertaining to a complex RICO Statute which have not been, but should be settled by this Court. In addition, the Court of Appeals has rendered a decision which conflicts with a decision of this Court or of another Court of Appeals on the same matter. Finally, the decision below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

1.

Whether an accused charged with a violation of 18 U.S.C. § 1962 (c) may properly be convicted by proof of associating with an enterprise not charged in the Indictment.

a) Count Two of the Indictment charged that Russello "did conduct and participate, directly and indirectly, in the conduct of the affairs of an enterprise" through a pattern of racketeering activity. The Indictment then charged that twenty-two (22) named individuals were associated together in fact, for the purpose of defrauding insurance companies, as the alleged enterprise. Included among the group of individuals associated in fact as the enterprise were John Thomas Rivera, Joe Gomez, Manuel Enfemio Fernandez, Jr., John Nicholas Lostracco and Richard W. Stark.

The jury, by their verdict, found that there was a different enterprise than that charged in the Indictment. The jury acquitted Rivera, Gomez, Fernandez and Stark. Thus the jury found that, in fact, there was a different group of individuals associated together (for the purpose of defrauding insurance companies by use of the mails and acts of arson) than the group charged in the Indictment.

Under the Fifth Amendment's provision that no person shall be held to answer for a capital crime unless on the Indictment of a grand jury, it has been the rule that after an Indictment has been returned its charges may not be broadened except by the grand jury itself. *Stirone v. United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960); *Ex Parte Bain*, 121 U.S. 1, 7 S. Ct. 781, 30 L. Ed. 849 (1887). In 1887, the Supreme Court in *Bain*, supra, 121 U.S. at 9-10, 7 S. Ct. 781, held that a Defendant could only be tried upon the Indictment as found by the grand jury and that language in charging part could not be changed without rendering that Indictment invalid. In *Stirone*, supra, 361 U.S. at 217, 80 S. Ct. 273, the Supreme Court stated that

Bain "stands for the rule that a court cannot permit a defendant to be tried on charges that are not made in the Indictment against him."

In *Gaither v. United States*, 134 U.S. App. D.C. 154, 413 F. 2d 1061, 1071 (1969), this definition of an amendment prohibited by *Stirone* and *Bain*, as opposed to the concept of a variance in proof from the Indictment, appears:

> An amendment of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A variance occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

These definitions have been quoted with approval by several Courts of Appeal. *United States v. Pelose*, 538 F. 2d 41, 45 n. 8 (2d Cir., 1976); *United States v. Somers*, 496 F. 2d 723, 743 n. 38 (3d Cir.), cert. denied, 419 U.S. 832, 95 S. Ct. 56, 42 L. Ed. 2d 58 (1974); *United States v. Bursten*, 453 F. 2d 605, 607 (5th Cir., 1971), cert. denied, 409 U.S. 843, 93 S. Ct. 44, 34 L. Ed. 2d 83 (1972).

This distinction between an amendment and a variance is critical because a variance is subject to the harmless error rule, *Berger v. United States*, 295 U.S. 78, 82, 55 S. Ct. 629, 79 L. Ed. 1314 (1935), whereas an amendment prohibited by *Stirone* and *Bain* is prejudicial per se. *United States v. Bryan*, 483 F. 2d 88, 96 (3d Cir., 1973); *United States v. DeCavalcante*, 440 F. 2d 1264, 1271 (3d Cir., 1971); *Gaither v. United States*, supra, 413 F. 2d at 1072. Sometimes, however, there is a problem in identifying when an amendment is made to an indictment. That problem occurs when the charging terms of an indictment have been effectively

altered by events at trial. *United States v. Somers*, supra 496 F. 2d at 774.

Stirone v. United States, supra, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252, involved a "constructive" amendment. The defendant was found guilty, but the Supreme Court reversed the conviction, stating that the defendant's right to be tried only on charges presented in an indictment returned by a grand jury had been destroyed even though the indictment had not been formally changed. *Stirone v. United States*, supra, 361 U.S. at 217, 80 S. Ct. 270.

Under *Stirone*, the question to be asked in identifying a constructive amendment is whether there has been a modification at trial in the elements of the crime charged. Such a modification would result in a constructive amendment.

Such is what occurred in the trial of Petitioner, Russello. This Court's decision in *United States v. Turkette*, _____ U.S. _____, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981), was rendered almost simultaneously with the decision below. The existence of the enterprise charged is an essential element of the offense charged under RICO, 18 U.S.C. § 1962 (c) and (d). As *Turkette* held, in order to secure a conviction under RICO, the Government must prove the existence of *an* enterprise. The existence of *an* enterprise at all times remains a separate *element* which must be proved by the Government. 101 S. Ct. at 2528 and 2529 (Emphasis supplied).

It only remains for this Court to now clearly hold, through the vehicle of this case, that when the enterprise is charged as being "a group of individuals associated in fact," the Government must prove the enterprise charged. Proof of some different or lesser group is not proper or sufficient.

The Fifth Circuit has contended that it has read *Stirone* differently than some other Circuits. That Circuit's doctrine

was expressed in *United States v. Malatesta*, 583 F. 2d 748 at 756 (5th Cir., 1978) as follows:

> "when the indictment charges a violation of a statute in general terms, proof of acts of the kind described, although those acts are not specifically mentioned in the indictment, does not constructively amend it, at least absent a demonstration that this was, or might have been, prejudicial to the defendant." 583 F. 2d at 756

Count Two of the Indictment against Russello did not charge the enterprise in general terms, but was specific in describing the separate enterprise element. The proof at trial constructively amended the Indictment by modifying the enterprise element.

b) An examination of the Indictment, jury verdicts, instructions to the jury, and the opinion of the Appellate Court fails to disclose what was the enterprise in the case.

Count One of the Indictment, the enterprise conspiracy count, charged that twenty-three (23) Defendants were associated together in fact as the enterprise. Count Two has charged only 22 Defendants as the enterprise and omitted Berton B. Chase. Chase was included in Count One.

As noted, the jury acquitted Rivera, Gomez, Fernandez and Stark from the list of individuals comprising the enterprise. The opinion failed to distinguish between the enterprise charged in Count One from that charged in Count Two and seems to include Chase in both (although the lower court reversed the conviction of Chase in Count One — the only Count in which he was charged).

The Trial Court's instructions to the jury on Count One (Vol. 4, Doc. 381, P. 14 & 15) advises the jury that the term enterprise will be defined in that part of the instructions dealing with Count Two. In the Trial Court's instructions dealing with Count Two (P. 21 of Doc. 381) the Trial Court told the jury that the term "enterprise" includes "any" group of individuals associated in fact although not a legal

entity. In instructing on the elements of Count Two the Trial Court instructed that the Government must prove, as the first of five elements, that the Defendant was associated with an "enterprise" as defined in the instructions. The definition of enterprise, as given, included *any* grouping of individuals associated in fact. Thus the instructions apparently permitted a finding of an enterprise consisting of, for example, Noriega, Carter, Guarino, Scionti and Russello.

The evidence showed Russello associating only with Noriega and then, following the fire set by Noriega on Russello's building, with Carter.

Later in the instructions, the Trial Court did instruct that what the jury must do is to "determine whether the *single* enterprise consisting of a group of individuals associated in fact, existed *as charged in the indictment*". (Emphasis supplied, P. 29 of Doc. 381, Vol. 4).

Of course, Counts One and Two of the Indictment charged *two* different groupings of individuals as being associated in fact as the enterprise. Chase was included in Count One but not in Count Two. The verdicts omitted Rivera, Gomez, Fernandez and Stark. The appellate opinion omitted Rivera, Gomez, Fernandez and Stark from being associated in fact as the enterprise and failed to note or distinguish the different groupings in Counts One and Two.

The Appellate Court has thus upheld a conviction on charges that, in essence, were not alleged in the Indictment nor presented to the jury at trial. This offends the most basic notions of due process. *Dunn v. United States*, 442 U.S. 100, 99 S. Ct. 2190, 60 L. Ed. 2d 743 (1979).

This complex statute, indictment and trial has allowed the definition of the enterprise to shift for each co-defendant and for each Count. It has made the enterprise element more of an intellectual exercise for ingenious prosecutors than a critical element in the offense — an element essential to carrying out Congress' purpose.

As noted by the Fourth Circuit Court of Appeals in *United States v. Griffin*, 30 Cr. L. 2100 (10/2/81), where the enterprise charged is a group of individuals associated in fact, the composition of the group would seem essential to proof of such an entity's "separate" existence. This Court in *Turkette* seems to recognize as much in analyzing the nature of an "illegitimate" RICO enterprise.

2.

Whether an accused charged with a violation of 18 U.S.C. § 1962 (d) may properly be convicted by proof of associating with an enterprise not charged in the Indictment?

The argument pertaining to the conspiracy charge contained in Count One regarding the proof of the essential element of "enterprise" is the same as that advanced above.

3.

Whether a mere customer of a racketeering enterprise is criminally liable under 18 U.S.C § 1962?

Petitioner Russello adopts the arguments advanced by co-petitioners, Lazzara and Farina in support of this question.

4.

Whether joint trial principles of *Kotteakos v. United States*, 328 U.S. 750 (1946) are inapplicable to RICO prosecutions?

Petitioner Russello adopts the arguments advanced by co-petitioners Lazzara and Farina in support of this question.

Russello would additionally assert that the proof showed, at most, that Russello, on one occasion, secured Noriega's services to burn his building. After Carter had legitimately obtained the adjusting assignment from the insurance company, Russello used Carter's alleged services only on this one fire to help adjust the insurance claim.

There was no evidence that Russello was an associate, *who continued to function*, with any group of individuals. Nor did the proof establish that Russello had a common purpose with any co-defendant to engage together in a *continuing course of conduct or as a continuing unit.* See *Turkette*, supra.

As in *United States v. Sutherland*, 656 F. 2d 1181 (5th Cir., 1981), the nature of Russello's agreement and association with Noriega, and then with Carter, was not such that he must have known that others were also conspiring to commit racketeering offenses with Noriega, Carter, or any other co-defendant.

Multiple conspiracies were shown by the proof and the multiple conspiracy doctrine should have precluded the joint trial in this case. The variance affected substantial rights of Russello.

5.

Whether, with respect to the mail fraud convictions, there was a fatal variance between the charge in the Indictment and the evidence?

The Indictment charged in Counts 28 and 29 that Petitioners Russello, Lazzara, Carter and Noriega devised a scheme to defraud the insurance company by filing a Proof of Loss stating they did not know who set the fire. Lazzara was acquitted by the jury of this charge.

The Government offered evidence that the parties involved knew Noriega had set fire to the building. Carter

also testified that the building's value listed on the claim was inflated by design of he and Russello.

Russello argued to the Appellate Court that there was a fatal variance between the charge and the proof because the evidence was totally insufficient to support the contention that the value of the building was inflated.

The Court of Appeals thought that there was some merit to this contention, but found that the variance was not of such substance as to warrant reversal. 648 F. 2d at 406. The Court of Appeals found that Carter's testimony was almost an aside.

The Court of Appeals failed to consider, however, that the Government introduced substantial evidence that as part of the alleged conspiracy and enterprise alleged in Counts One and Two, many of the members of the group associated together in fact were building owners, *who filed inflated proof of loss statements* to collect insurance proceeds. 648 F. 2d at 380.

Thus the testimony of Carter concerning Russello's actions in filing an alleged inflated proof of loss was supported and enhanced by the allegations and testimony introduced against other alleged co-conspirators or members of the charged enterprise. Carter's testimony against Russello in this regard was not treated as an aside at the trial by the Court or the parties.

A substantial part of Russello's defense was directed toward rebutting and disproving Carter's supposed "aside" testimony. The Government did not object to this defense testimony, nor did the Government withdraw this contention from the consideration by the jury. The Court did not strike Carter's testimony in this regard, nor did the Trial Court instruct the jury to disregard the testimony.

On the contrary, the Trial Court instructed the jury that they could convict Russello of mail fraud if the Government proved a scheme "substantially the same" as the one alleged in the Indictment. (Vol. 90, P. 211).

Thus there was another variance which substantially prejudiced the due process rights of Russello. In this instance the variance pertained to the mail fraud counts (which also were alleged to be part of the pattern of racketeering activity in Counts One and Two).

The convictions for mail fraud should also be reversed to promote the fairness of the trial and to ensure the Defendant notice and an opportunity to be heard. See *Kotteakos v. United States*, 328 U.S. 750, 66 S. Ct. 1239 (1946).

6.

Request to adopt issues and arguments of co-petitioners.

Petitions for Writ of Certiorari have been filed with this Court by co-petitioners listed in the list of parties of this petition. Russello requests this Court to allow him to adopt the issues and arguments that benefit Russello and specifically those described hereinabove and those of Petitioner, Martino.

Conclusion

For the aforementioned reasons, and in the interests of justice, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

/s/ Raymond E. LaPorte

RAYMOND E. LaPORTE
410 Ware Boulevard
Suite 601
Tampa, Florida 33619
(813) 621-4771

Attorney for Petitioner,
JOSEPH C. RUSSELLO

Certificate of Service

I HEREBY CERTIFY that three copies of the foregoing Petition for Writ of Certiorari have been furnished, by Express Mail, First Class Postage Prepaid, to the Solicitor General, Department of Justice, Washington, D.C. 20530 and to Sara Criscitelli, Esq., Appellate Division, Department of Justice, Post Office Box 899, Ben Franklin Station, Washington, D.C. 20044; and by regular First Class Mail,

Postage Prepaid, to all co-counsel listed below, on this the 10th Day of December, 1981.

D. Frank Winkles, Esq.
412 Madison Street
Tampa, FL 33602

Barry A. Cohen, Esq.
100 Twiggs Street
Suite 4000
Tampa, FL 33602

William B. Plowman, Esq.
304 Plant Avenue
Tampa, FL 33606

Steve Yerrid, Esq.
610 N. Florida Avenue
Tampa, FL 33602

Sam D. Pendino, Esq.
606 Madison Street
Tampa, FL 33602

Guy Labalme, Esq.
725 E. Kennedy Blvd.
Tampa, FL 33602

Edward Garland. Esq.
1012 Chandler Bldg.
Atlanta, GA 30303

Michael Addison, Esq.
100 Twiggs Street
Suite 301
Tampa, FL 33602

Peter N. Macaluso, Esq.
712 W. Platt Street
Tampa, FL 33606

Arthur Fisher, Esq.
711 N. Florida Avenue
Tampa, FL 33602

William Fussell, Esq.
25 Davis Boulevard
Tampa, FL 33606

Daniel Newman, Esq.
205 S. Dale Mabry Highway
Tampa, FL 33609

/s/
Attorney